U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 09 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of privacy

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a telecommunications installation and operations firm. It seeks to employ the beneficiary permanently in the United States as an accounting chief. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, current counsel submits additional evidence and asserts that the director erred in evaluating the petitioner's evidence supporting its continuing financial ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this case, rests in part upon the petitioner's financial ability to pay the beneficiary's proposed wage offer as set forth in the approved labor certification. It must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 13, 1998. The proffered wage as stated on the Form ETA 750 is $45,500 per year.[1] The ETA 750 was filed by "L.A. Tel Corp." The address and name of this petitioner is different from the petitioner "L.A. Tel Cellular" on the immigrant visa petition (Form I-140). On the Form ETA 750B, signed by the beneficiary in January 1998, the beneficiary claims to have worked full time for L.A. Tel Corp., since October 1991, as an accounting chief.

[1] The director's decision misstated the proffered wage as $40,040 per year.

On the I-140, the petitioner claims to have been established in 1994, to have a net annual income of approximately $157,000, and to currently employ 48 workers. In support of its ability to pay the proffered salary of $45,500, the petitioner, through former counsel, submitted a copy of unaudited financial statements covering the period between January 1 and December 31, 2001[2] and copies of its Form 1120S, U. S. Income Tax Return for an S Corporation for 1998, 1999, and 2000. These tax returns indicate that the petitioner uses a standard calendar year to file its taxes. The tax returns also state that the petitioner was incorporated in 1990. The City of Los Angeles Tax Registration Certificate issued in the petitioner's name, however, indicates that the date the business started was January 1, 1994.

The tax returns reflect the following information for the following years:

	1998	1999	2000
Net income	$11,281	$29,448	$45,022
Current Assets	$25,810	$62,882	$223,003
Current Liabilities	$13,011	$23,981	$206,881
Net current assets	$12,799	$38,901	$16,122

Along with this information, former counsel's transmittal letter states that L.A. Tel Corp. is doing business as L.A. Tel Cellular and generates its revenue through 40 sales agents who are paid by commission and who obtain customers for cellular telephone companies. Former counsel also explains that the beneficiary began working for the petitioner in 1991 as its Accounting Chief before it started its cellular sales operations in 1994.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 16, 2002, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner resubmitted its corporate tax returns for the years enumerated above and additionally submitted a copy of its 2001 corporate tax return. This tax return shows that the petitioner declared $51,859 in net income in 2001. Schedule L reflects that it had $640,964 in current assets and $582,057 in current liabilities, resulting in $58,907 in net current assets.

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[2]Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

In addition, former counsel submitted various copies of the petitioner's bank account statements including a copy of a certificate of deposit account with Washington Mutual Bank showing an original deposit of $100,000 as of November 1, 2001, a CalFed certificate of deposit (shows the petitioner's address change in 7/02) with a balance of $587,003.09 as of October 2002, and copies of CalFed checking account statements for the period from January 1st through August 31, 2002.

Former counsel also included a letter from the Bank of America to [redacted] the petitioner's president, dated October 11, 2002. The letter references two checking accounts but does not distinguish whether they are individual or business accounts. Also included is a list of independent contractors doing accounting work for the petitioner. It shows that three individuals, including the beneficiary, have performed accounting contracting work from 1998 to 2001. Former counsel's cover letter, however, asserts that this list represents payments to employees working for the company and to individuals outside the company. He then states that none of these individuals worked full time for the company as an accountant. The list states that the beneficiary received $5,300 from the petitioner in 2000 and received $23,615 in 2001. Former counsel also submits copies of three checks from June through August 2002, drawn on the petitioner's account, and showing three individual payments of $5,000 to the beneficiary during this period. It is unclear what these payments represent. Counsel states that the beneficiary began working full time for the petitioner in August 2001. A letter, dated November 22, 2002, from the petitioner's president [redacted] accompanies these submissions. It describes the complexity of the petitioner's operation and the necessity for an accounting chief. Mr. [redacted] states that the beneficiary started working for the petitioner in August 2001 and praises his abilities in increasing accounting efficiency. No Wage and Tax Statements (W-2s) or Form 1099s (Miscellaneous Income)[3] were submitted to verify the exact amounts paid to the beneficiary in the period prior to 2002.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on January 2, 2003, denied the petition. The director noted that the petitioner's net income in 1998 and 1999 was insufficient to cover the proffered wage. The AAO would further note that the petitioner's net income of $45,022 in 2000 was also insufficient to meet the proffered salary of $45,500.

On appeal, current counsel asserts that the petitioner was paying individuals outside of the company for work that the beneficiary will be performing. Counsel specifically cites the amounts that "Ms [redacted] received for outside contracting work in 1998, 1999, and 2000. In those years, according to Ms. [redacted] declaration[4] and Form 1099s submitted on appeal, she received $40,565, $50,000, and $32,500, respectively, for accounting work. A letter, dated January 25, 2003, from [redacted] confirms that she was paid as an independent contractor and is now employed in the petitioner's accounts receivable and collections department as a regular employee. Mr [redacted] states that the money necessary to compensate the beneficiary was already paid out to independent contractors in those years.

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[3] The evidence of contractor wages would need to credibly establish the salary that an alien would receive as a paid employee after deducting expenses.

[4] Ms [redacted] declares that she resides at [redacted] the same address as that given for the petitioner on its earlier tax returns.

While the monies already paid to the beneficiary to perform the duties of an accounting chief may be reasonably considered in evaluating the petitioner's ability to pay the proffered wage, as noted above, no W-2s or Form 1099s issued to the beneficiary have been submitted to the record for consideration. Further, the evidence does not establish that the beneficiary would have replaced Ms [redacted] Rather, according to the list of independent contractors submitted to the record, both Ms [redacted] and the beneficiary were providing accounting services to the petitioner in 2000. Further, both apparently are still employed with the petitioner, suggesting that the beneficiary did not replace Ms [redacted] but is more probably her supervisor, if the duties of the proffered position and his duties are set forth accurately on the ETA 750, Part A and B, respectively.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner's evidence did not establish that it employed and paid the beneficiary the full proffered wage in any of the relevant years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In the instant matter, as noted above, the petitioner's net income was $34,219 less than the proffered wage in 1998, $16,052 less than the proffered wage in 1999, and $478 less in 2000. Although not discussed by the director, CIS will also consider *net current assets* as an alternative method of evaluating a petitioner's ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets and current liabilities are shown on Schedule L of a corporate tax return, as noted above. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. Here, except for 2001 where the petitioner's net income was already shown to be sufficient to

[5] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

pay the proffered wage, the petitioner's net current assets in 1998, 1999 or 2000 were not sufficient to pay the beneficiary's wage offer of $45,500. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause.

Counsel also asserts that the petitioner's substantial cash reserves as shown by previously submitted documents establishes the petitioner's ability to pay the beneficiary's wage offer. These documents include the CalFed certificate of deposit with a balance of $587,003.09 as of October 2002, a CalFed letter, dated October 10, 2002, to [redacted] describing a relationship since 1993 during which the average balance has been over a million dollars, and a Bank of America letter referencing a balance of over $265,000. It is noted that neither of the bank letters specifies whether these accounts belong to Mr. [redacted] individually or to the petitioner. CIS will not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Although the certificate of deposit shows a substantial sum, there is no evidence that these funds had been available beginning at the priority date in 1998. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay as of the priority date assigned by the date of first acceptance by any office within the DOL employment system.

Counsel's reliance on the balances in the petitioner's bank accounts is not persuasive. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements do not sufficiently reflect the encumbrances which may affect a petitioner's financial status and generally do not show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on these bank accounts somehow reflect additional available funds that were not reflected on its tax returns for the relevant period in 1998, 1999, and 2000.

On appeal, counsel claims that *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967) is applicable to the petitioner's continuing ability to pay the proffered wage. *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa.* The petitioner's tax returns do not reflect a framework of sufficiently profitable years to cover the beneficiary's proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a continuing ability to pay a beneficiary's wage offer beginning as of the visa priority date. In this case, the evidence does not convincingly establish that the petitioner's ability to pay the proffered wage has continually existed as of the priority date of January 13, 1998.

Beyond the decision of the director, and as noted above, the evidence submitted in this case also raises a basic question as to whether the petitioner on the labor certification, L.A. Tel. Corp., or the I-140 petitioner, L.A. Tel Cellular, Inc., can be considered to be the same employing entity, different employers, or whether the petitioner may be a successor-in-interest to the original company listed on the ETA 750.[6] First, the evidence suggests that both may have been organized as separate corporate entities with different addresses. Also, the inconsistent dates given for the I-140 petitioner's initial launch as a business entity in various documents does not clarify the relationship. Finally, if both are claimed to be the same employing entity, the evidence presented in the ETA 750B claiming that the beneficiary has been employed by L.A. Tel. Corp. as a full-time accounting chief since 1991 obviously conflicts with other evidence indicating that he did not begin working for the I-140 petitioner until 2001. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho,* 19 I&N Dec. 582, 591-592 (BIA 1988).

Also beyond the director's decision, it is noted that the evidence submitted in support of the beneficiary's educational credentials does not appear to conform to the requirements of the approved labor certification. The regulation at 8 C.F.R. § 204.5(l)(2) defines a third preference professional as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and is a member of the professions." In this case, item 14 of the ETA 750A clearly states that an applicant for the position of accounting chief must have a master's degree in banking or accounting. The record reveals that while the beneficiary has a master's degree, it is in sociology, not banking or accounting. He has also successfully completed professional training in banking given by the Institute of Bankers in Bangladesh, however, the evidence does not establish that this professional certification may be considered a master's degree.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

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[6] A successor-in-interest status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).